Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL MEMORANDUM FOR PETITIONERS PURSUANT TO RULE 15.7

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SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

Petitioners submit this supplemental memorandum in response to the *amicus* brief filed by the Solicitor General. The government's brief underscores the need for this Court's immediate intervention in this "complex and important case." U.S. Br. 6.

Although it intervened below to seek reinstatement of the complaints, the United States acknowledges that the court below was simply wrong in holding that the domestic insurers forfeited antitrust immunity when they acted in concert with foreign reinsurers that were not subject to state regulation. U.S. Br. 7-9. It admits that this erroneous decision raises "legitimate and justifiable concern" that the "day-to-day business activities" of the insurance industry are now fair game for antitrust attack. *Id.* at 9. The government also acknowledges that the line between protected and unprotected conduct is left ambiguous by the court of appeals' "boycott" ruling. That holding, the government concedes, creates new "uncertainties" about whether the antitrust laws prohibit commonplace and essential discussions within the industry regarding the terms upon which insurance is offered. *Id.* at 13-14 & n.11.

The United States agrees with us that the Ninth Circuit's decision has sweeping implications for this Nation's insurance industry. It does not dispute that the court of appeals "'has disrupted the most basic operations'" of the industry. U.S. Br. 6. In fact, the government notes that state officials have heralded the decision below as an invitation to them to challenge "'many of the activities that currently go on in the industry.'" *Id.* at 6 & n.2, quoting George Sampson, New York's Chief of Antitrust Enforcement. See also Pet. 10-11. The impact of the Ninth Circuit's decision, which state officials have made clear will be used to prosecute a "nuclear attack on the insurance industry" (see Pet. 10), cannot be exaggerated. Domestic companies are now at a loss to know how to deal with foreign reinsurers, though reinsurance is vital to the industry (U.S. Br. 8 n.6); and they can no

longer predict whether traditionally permitted collective measures to respond to major economic developments will trigger massive antitrust penalties.

The government concedes that the issues we raise are of great practical importance, that the Ninth Circuit's forfeiture ruling is indefensible, and that its boycott holding leaves a vital domestic industry in a state of serious confusion. Its reasons for nevertheless recommending that certiorari be denied are in error.

I. The government makes clear that the court of appeals' extraordinary forfeiture ruling was wrong. U.S. Br. 7-9. It asserts that review is nonetheless unnecessary because that ruling was "unilluminating," interlocutory, and only an "alternative" basis for the court's judgment. The forfeiture ruling is not, however, in the least bit "unilluminating" to state antitrust enforcement officials (or private plaintiffs): they claim that it gives them carte blanche to attack standard and essential industry practices (see Pet. 14-15) free of McCarran immunity, merely by alleging that American companies have dealt with foreign reinsurers or other "non-exempt entities" (such as brokers, risk managers, and consumer representatives).[1] Nor is it "unilluminating" to the insurance industry, which must now reconsider established patterns of doing business or risk staggering antitrust sanctions.

Though the government frequently refers to the "interlocutory" status of the forfeiture ruling, it nowhere explains how trial of this already enormously costly and

[1] Applauding the Ninth Circuit's forfeiture holding, New York's Chief of Antitrust Enforcement, George Sampson, has recently declared that "only one example" of a "quite typical" way in which established industry practices violate the antitrust laws is an agreement between primary insurers and foreign reinsurers as to the premiums the primaries will charge. N.Y. State Bar Ass'n, Antitrust Law Sec. Symposium 108-109 (Jan. 28, 1992). The legislative history of the McCarran Act is unmistakable that such agreements on rates and terms of insurance between primaries and reinsurers (including foreign reinsurers)—which Mr. Sampson acknowledges are "common" (*id.* at 108)—are exempt from the Sherman Act. See Pet. 16-17.

disruptive case could shed any light on the forfeiture issue. Where an interlocutory error in an antitrust case has severe consequences, this Court has not hesitated to grant review (see Pet. Reply Br. 1-2). Given the highly adverse and immediate impact of the forfeiture ruling—which deters collective forms development permitted by state laws throughout the nation, and which impedes access to foreign reinsurance and retrocessional markets that are vital to maintaining domestic insurance capacity—that ruling demands immediate review.

The government's suggestion that the forfeiture ruling does not warrant review because it was only an "alternative" holding that cannot alter the judgment is plainly in error. The court of appeals held that the domestic sellers of excess and umbrella coverage lacked immunity *solely* because "they engaged in agreements [with] non-exempt Lloyd's underwriters." Pet. App. 25a. The Solicitor General may disagree with the court's ruling that "[n]o boycotts are alleged as the defendants' modus operandi in respect to these branches of insurance" (*ibid.*; see U.S. Br. 9 n.7), but that was the explicit basis of the Ninth Circuit's judgment, which cannot survive reversal of the erroneous forfeiture holding.

Moreover, the government is strangely oblivious to the immediate and substantial impact that the forfeiture decision portends if this case proceeds to trial. Armed with the Ninth Circuit's forfeiture ruling, the states contend that they need prove at trial merely an "agreement" with foreign reinsurers. See Pet. 14 n.17; note 1, *supra*. But if we (and the Solicitor General) are right in asserting that the forfeiture ruling is erroneous, the states would have the quite different task of proving a "boycott" as required by the McCarran Act. This gigantic litigation—labeled by respondents as "the mother of antitrust-type cases" and "the biggest and most important civil case now pending" (see Pet. 10, 13)—should not be permitted to lumber forward governed by a legal standard that is plainly wrong.

It is cold comfort to the industry that the government now says that the forfeiture ruling is wrong and that domestic insurance companies retain immunity though they agree on terms with foreign reinsurers. U.S. Br. 9. As this Court noted after granting certiorari in the face of similar reassurances, the Solicitor General is wholly unable to protect domestic companies from state or private antitrust enforcement. *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 133 (1983). The Solicitor General may be content to wait for a final judgment on the forfeiture theory before urging review. But the insurance industry cannot order its business affairs under an explicit threat of state and private antitrust litigation aimed at its ordinary commercial practices.

II. The Solicitor General disagrees with us on the merits of the boycott issue, but fails to explain how the activities described in the complaints—insurance companies discussing and agreeing on the terms of insurance and reinsurance and then offering insurance only on the agreed terms—constitute a "boycott." Our petition (at 24-25) challenged plaintiffs to justify the court of appeals' assertion that this case involves "much more" than the implementation of an agreement to do business only on particular terms. Plaintiffs were unable to do so, and now the Solicitor General has simply repeated the complaints' pejorative characterizations of the conduct at issue without demonstrating that it goes beyond the scope of immunity. U.S. Br. 10 & n.8. As one commentator has observed, by "adopting a conclusory definition of boycott" the Ninth Circuit has "undermined Congress's desire to protect insurance companies from antitrust liability" and "deprive[d] McCarran-Ferguson immunity of any practical effect." Note, *McCarran-Ferguson Immunity*, 105 HARV. L. REV. 1414, 1418 (1992).[2]

[2] The government is incorrect in suggesting (U.S. Br. 10 & n.8) that we are engaged in a fact-bound dispute over whether the complaints allege "much more" than the implementation of an agreement on terms and conditions. Neither in the courts below nor in this Court have we disputed *any* of the *facts* alleged in the complaint—only the claim that the facts amount to anything more than a protected agreement on terms.

The United States concedes that the legal standard applicable to this issue is fraught with confusion and inconsistency: "it is by no means always self-evident whether a particular set of facts constitutes a 'boycott' "; there are "uncertainties * * * in this area of law." U.S. Br. 13. The government's own efforts to draw the line between protected activity and a forbidden boycott perfectly illustrate this uncertainty. The government admits that insurers and reinsurers may insist on agreement as to the terms of doing business, and that this conduct "does not become a non-immune boycott merely because it has some effect on other insurers." *Ibid.* But it says that a boycott occurs if insurers use "pressur[e]" or "coerce recalcitrant members." *Id.* at 13-14. The government admits that not "every * * * conditional refusal to deal" is a boycott—yet is wholly unable to distinguish the activities in which insurers may safely engage. *Id.* at 14 n.11. According to the government, "McCarran-Ferguson allowed the defendants to 'confer and agree on the terms on which insurance would be offered' [and] 'the immunity in so doing is incontestable,' " yet defendants were forbidden to engage in " 'regulation of the terms on which CGL and property insurance will be offered.' " *Id.* at 10. These conclusory and confusing assertions—never shown to bear any relationship to the conduct alleged in this case—provide no meaningful guidance to the insurance industry. Insurers need rules that they may reasonably comprehend; they cannot operate effectively in a legal quagmire, under threat of prosecution for ordinary business practices.[3]

The government is wrong in claiming that *South-Eastern Underwriters Ass'n*, "a clear example of a boycott," involved "conduct similar to that alleged here." U.S. Br.

[3] The government suggests (U.S. Br. 12) that petitioners' activities may have involved "coercion" or "intimidation." That clearly was not the basis of the Ninth Circuit's ruling, which rested solely on a determination that plaintiffs had alleged a "boycott."

11 & 13 n.10. The members of that trade organization absolutely "refused to deal" with "non-members," "threatened to boycott and withhold patronage from persons purchasing fire insurance from such companies," and maintained private courts "to police" their boycott. U.S. Br. at 3-4, *SEUA* (No. 43-354). Nothing remotely comparable to that is alleged here. The United States' suggestion that the meaning of the boycott exception may be readily discerned from the Sherman Act is likewise incorrect because the courts are split on what constitutes a boycott and because the boycott standard is *not* "coextensive with the prohibitions of the Sherman Act." *Barry*, 438 U.S. at 545 n.18.

As the government notes (U.S. Br. 10), *Barry* is the only case in which this Court has construed the boycott exception in the half-century since McCarran was enacted. And *Barry* has bred serious confusion in the lower courts. *Barry* repeatedly emphasized that the agreement there at issue—an agreement not to compete for customers in a particular territory—was an absolute refusal to "deal on any terms." 438 U.S. at 544, 552-553. See also U.S. *Amicus* Br. at 8 in *Barry*, No. 77-240 (*Barry* involved "not just a refusal to deal on certain terms, but a refusal to deal at all"). This indicates that the presence of an absolute refusal to deal is at least an important consideration in determining if a boycott exists; how important a consideration is a question that has hopelessly divided courts and commentators (Pet. 22 & n.19).

Petitioners can take little comfort from the government's assurance that their alleged conduct may pass antitrust muster under a rule of reason. U.S. Br. 14-16. The whole purpose of McCarran was to "fre[e] the insurance business" of an antitrust regime that would "reduce it to a shambles," leaving regulation of the industry to expert state agencies. R. Posner & F. Easterbrook, ANTITRUST 1046 (2d ed. 1981); see Pet. 10, 23-24. Relegating oversight of industry practices to lay juries applying generalized antitrust standards would wholly subvert McCarran's goals. Furthermore, under the government's analysis, perfectly legitimate conduct that satisfies the rule of reason could nonetheless amount to a "boycott" that strips the parties of McCarran protection—a result that finds no support in the authorities.

This Court should grant certiorari to dispel the pervasive confusion surrounding McCarran's boycott exception at the same time that it considers the Ninth Circuit's erroneous forfeiture ruling, and in conjunction with its review of the McCarran Act in *United States Dep't of the Treasury* v. *Fabe*, cert. granted, 112 S. Ct. 1934 (1992) (No. 91-1513). This would not constitute "interlocutory" review. If this Court reverses the Ninth Circuit's forfeiture and boycott rulings, that would result in reinstatement of Judge Schwarzer's decision and bring this protracted litigation to a close, serving the goal of judicial economy.

III. The government also claims that the state action doctrine is inapplicable here because state insurance officials did not approve the alleged "reinsurance boycott." U.S. Br. 17. That is an insufficient basis to defeat application of the state action doctrine to petitioners' collective forms development in the face of the states' express authorization of collective action and intensive scrutiny of the end result of that process.

States *authorize* collective action and then *supervise* it by scrutinizing the *end result* for conformity with state policy.[4] They do not ordinarily supervise the *process* by which those end results are reached. Thus, in *Southern Motor Carriers* the Court found state action without requiring the states to sit at the carriers' bargaining table;

[4] The government observes that "the state insurance laws expressly prohibit coercion and boycotts" (U.S. Br. 17), but that fact cannot defeat application of the "clear articulation" prong of the state action doctrine for reasons stated by Judge Schwarzer (Pet. App. 60a-61a) and elaborated in the petition (at 27 & n.21). Unquestionably, "the State as sovereign clearly intends to displace competition in [this] field with a regulatory structure." That is enough to satisfy the "clear articulation" requirement. *Southern Motor Carriers*, 471 U.S. at 64.

in *Patrick* v. *Burget* the Court found state action lacking because the state supervised the process *rather than* the end result (see 486 U.S. at 105); and in *Ticor* the Court found state action lacking because "the potential for state supervision was not realized in fact" (112 S. Ct. at 2179).[5] Application of those precedents fully supports a finding of state action immunity, as Judge Schwarzer correctly observed (Pet. App. 62a (emphasis added)):

> [H]ere[] supervision took the form of approval, disapproval, or modification of the end product of the collective action. That degree of supervision was sufficient protection of the public interest, without the necessity of additional supervision of the *manner* in which the participants conducted the collective process.

The state action doctrine will virtually cease to exist if this Court allows it to be defeated by allegations of inadequate supervision of the *process* by which agreement is reached where (unlike in *Ticor*) there indisputably has been intense and adequate supervision of the end result. Because states do not ordinarily oversee private parties at the bargaining table, it will almost always be true that the states will not have "kn[o]w[n] about—let alone approved or actively supervised"—some aspect of the negotiating process. U.S. Br. 17. For that reason, no one has ever previously suggested that such an allegation could defeat application of the state action doctrine.

This case remains, as we said in the petition, a useful complement to this Court's recent *Ticor* decision. *Ticor* involved minimal state scrutiny (see 112 S. Ct. at 2179); this case involves state scrutiny of almost unprecedented

[5] *Ticor* makes it clear that the purpose of the active supervision inquiry is to determine "whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices [in this case, the forms] have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id.* at 2177. Where, as in this case, the State has engaged in active supervision by playing a "substantial role in determining the specifics" of the forms (*ibid.*), supervision of the process leading to the forms is simply unnecessary.

intensity. Moreover, the totality of market effects alleged here flowed from the states' approval of the revised advisory forms (see Pet. 3-6, 27-28), not from the prior negotiating process. *Ticor* involved price fixing (see 112 S. Ct. at 2180); this case involves activity that, according to the government itself, should be analyzed under the rule of reason (see U.S. Br. 14-16). In order to give the lower courts further guidance on the application of the state action doctrine, and to correct a clear error, this Court should review the state action issue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.[6]

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[6] This Court may wish to consider summary reversal of the Ninth Circuit's forfeiture ruling, which the United States acknowledges is in error and which threatens sweeping adverse effects in this litigation and in the insurance industry generally.

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